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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

LISA J. MONTAGUE,
Petitioner,

v.

UNITED STATES DEPARTMENT OF THE ARMY,
SECRETARY TOGO D. WEST, JR.;
TOGO D. WEST, JR.,
Respondents.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Does the Rehabilitation Act provide a federal employee a cause of action for retaliation because of her complaints that the government was violating the Act with respect to children with disabilities?

In a statutory retaliation case, which party bears the burden of persuasion on the issue whether an employee's activities in opposition to the unlawful practices of her employer are unprotected because the activities were disruptive and divisive?

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The unreported Opinion of the Eighth Circuit Court of Appeals, rendered on July 31, 1997, can be found at 1997 U.S. App. LEXIS 19761 (8th Cir. 1997). A copy of that Opinion and the Memorandum Opinion and Judgment of the United States District Court for the Eastern District of Missouri, rendered August 9, 1996, are reproduced in the Appendix to this Petition.

JURISDICTIONAL STATEMENT

The Judgment of the Eighth Circuit Court of Appeals was entered on July 31, 1997. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1254.

STATUTE AND REGULATIONS INVOLVED

Section 504 of the Rehabilitation Act provides as follows:

> Nondiscrimination under Federal grants and programs; promulgation of rules and regulations
>
> (a) Promulgation of nondiscriminatory rules and regulations; copies to appropriate committees. No otherwise qualified individual with a disability in the United States, as defined in section 7(8) [29 U.S.C. §706(8)], shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of

the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

29 CFR 1614.101

(b) No person shall be subject to retaliation for opposing any practice made unlawful by title VII of the Civil Rights Act (title VII) (42 U.S.C. 2000e et seq.), the Age Discrimination in Employment Act (ADEA) (29 U.S.C. 621 et seq.), the Equal Pay Act (29 U.S.C. 206(d)) or the Rehabilitation Act (29 U.S.C. 791 et seq.) or for participating in any stage of administrative or judicial proceedings under those statutes.

29 CFR 1614.103

(b) This part applies to:

(1) Military departments as defined in 5 U.S.C. 102.

STATEMENT OF THE CASE

Nature of The Case, Course of Proceedings, and Disposition in the Courts Below

Petitioner, plaintiff Lisa Montague, claims that she was constructively discharged from her civilian position as an occupational therapist for the Department of the Army. Montague alleged that she was forced to resign for three unlawful reasons: (1) because she filed two EEO charges alleging discrimination and reprisal against her by her superiors, (2) because she made multiple reports about violations of laws and regulations by the Army in its provision of services to children with disabilities, and (3) because her superiors regarded Montague as having a mental or emotional disability.

Montague filed two EEO charges against her superiors that were fully settled on August 15, 1990. Based upon the terms of that settlement agreement, the trial court made a pre-trial ruling that no evidence regarding the incidents of discrimination and reprisal alleged in those first two charges could be used in the trial of her constructive discharge claims. Order and Partial Judgment, 1/24/95. Plaintiff did not appeal that Order.

Plaintiff's constructive discharge retaliation claims were tried to the district court, without a jury, on February 15, and on August 7, 8, and 9, 1995. On August 9, 1996, the trial court issued its decision, ruling in favor of defendant on all counts. On July 31, 1997, the Eighth Circuit Court of Appeals, in per curiam, unpublished, opinion, affirmed.

Montague's Background and First Year of Employment with the Army

Lisa Montague, was hired by the Army in July 1988 as an Occupational Therapist (OT) to work in the Exceptional Family Member Program (EFMP) in Bremerhaven, Germany. She provided occupational therapy services to the disabled children of American military and civilian personnel who attended the Department of Defense Dependents Schools (DoDDS).

In July 1989, Dr. Lois Freisleben, Montague's supervisor, evaluated Montague's first year of service, and gave Montague the highest rating in all applicable categories and indicated she met or exceeded all expectations. Freisleben indicated Montague's performance was "excellent" in "relationship with colleagues," "cooperation with hospital/clinic personnel," and "professional conduct." At the end of her one-year probationary period Montague received both a within grade increase and a promotion.

Montague's Reports of Violations of Laws and Regulations Concerning Treatment of Children with Disabilities

During 1989 Montague began expressing her concerns about the lack of proper special education and related services for the children with disabilities under her responsibility. Montague initially raised her concerns internally, with her supervisor, Dr. Freisleben, and with other military officers responsible for special education services in Europe. In June of 1989, at the annual European EFMP Conference, Montague discussed her concerns with Paul Koffsky, an attorney from the Pentagon, and officials of the Department of Defense Dependents Schools. Montague testified that Koffsky and the others encouraged her to write a report detailing her concerns and to request an official monitoring visit.

Montague circulated the first draft of her report in October of 1989. Montague's report addressed the following subject: "Infractions of Laws Relating to Provision of Medically - Related Services and Special Education in NDL [Northern Deutschland]." Among other things, the report specifically alleges violations of 20 U.S.C. §§1401 *et seq.* (now called the Individuals with Disabilities Education Act (IDEA)) and other laws and regulations with respect to the inadequacy of the space available for the provision of OT services and the failure to provide extended school year services for the children with disabilities attending the DoDDS.

In November 1989 Montague showed a copy of her report to Colonel Charles Onefur, the Medical Director for the EFMP in Europe. Onefur testified that he also was aware of Montague's meeting with Koffsky in June 1989 and the nature of her concerns about the facilities. Onefur testified he knew there were problems regarding therapy facilities and that he had been unsuccessful in his attempts to address them.

In January 1990 Montague discussed her situation with and sent a memorandum to the Department of Defense Inspector General's office. While her October 1989 complaint to Koffsky did not implicate Montague's supervisors, Freisleben and Brian Olden, this one did. Montague provided a chronology of events, including an account of the deterioration in her relationship with Freisleben, and describing how Olden was suggesting she leave.

In February 1990 Montague sent another letter to Koffsky further addressing the OT services issue, naming Freisleben as a major cause of the problem and objecting to the assumption of supervisory responsibilities over EFMS staff by Olden. With her letter to Koffsky, Montague sent a document called "The Double Standard" describing several cases in which Freisleben failed to treat minority patients who qualified for EFMP services, and complaining that Freisleben did provide treatment to several non-qualifying white children of Colonels, friends, and favored staff members.

Also in February 1990 Montague wrote about her situation to Senator Robert Dole, from her home state. With her letter to Dole, Montague sent copies of her first EEO complaint (discussed below), her February letter to Koffsky, and "The Double Standard."

Montague kept Freisleben informed about the drafting of her report and her communications with the Pentagon about the lack of services to children. Freisleben received copies of everything Montague sent to Senator Dole—including several items highly critical of Freisleben, Montague's February 1990 letter to Koffsky, "The Double Standard," and her first EEO complaint. In March 1990 investigators interviewed Freisleben and Olden about Montague's first EEO complaint and Inspector General complaint.

Montague's First Two EEO Complaints

In February and March 1990 Montague informally initiated two EEO complaints. The allegations were aimed directly at her immediate supervisors, Freisleben and Olden. The formal statement of her first complaint indicates Montague was alleging "discrimination on the basis of handicap, and harassment and retaliation for making complaints." Among other things, Montague complained about an "open confrontation" with Freisleben and that Olden created a hostile and intimidating work environment. Montague's second EEO complaint alleges further discrimination, harassment, and reprisal, including an unjust suspension, for all of her prior complaints.

Ken Crawford, an EEO Counselor, conducted a thorough investigation for the Army of Montague's second EEO complaint and wrote a detailed analysis of the evidence. Crawford came to the following conclusions:

- Montague and her supervisors had adequate communication and mutual cooperation through October 1989,

- after a change in supervision there was a continuous and progressive deterioration in the working environment and the relationship between Montague and her supervisors,

- all common threads of mutual trust and respect between individuals seemed to have been broken,

- after her supervisors became aware of the first EEO complaint the intensity of their actions against Montague increased,

- Montague sincerely believed she must terminate her employment to save herself physically, emotionally and professionally, and

- the consistent pattern and tone of Olden's memos may have been a form of reprisal.

Reaction to Montague's Complaints by Her Superiors

In June 1989, the day after Montague's meeting with Koffsky and others at the EFMP conference, Montague told Freisleben about that meeting and her desire to write the report and request the monitoring visit. The trial court found that Freisleben "did not support the circulation of the memorandum and the request for a monitoring team." Appendix at A-5. Montague testified that Freisleben's initial response was that "they are the enemy."

While Montague was drafting the report to Washington, Freisleben continued to express her opposition to it. When Montague completed the first draft of her report in October 1989, Freisleben refused to sign it.

When a new OT arrived in December 1989, Freisleben told her to stay away from Montague, that she always had to have a cause. The new OT also heard Freisleben tell Carl Grube, director of DoDDS worldwide, that all of the problems in the EFMP clinic in Bremerhaven were due to one employee. Freisleben told another employee, "things would be better when we get rid of Lisa."

Colonel Onefur testified that he and Freisleben communicated with one another about Montague's actions and discussed their concerns about Montague's complaints. Onefur also testified that Freisleben kept him informed, "from time to time what some of her concerns were with what Ms. Montague's concerns were." Colonel Onefur did not want Montague to pursue her complaints and encouraged her not to do so. He became aware, however, that Montague did pursue her complaints by sending her report to the Pentagon and to Senator Dole.

Treatment of Montague by Her Supervisors Following Her Complaints

The trial court made the following findings regarding the relationship between Montague and her superiors following the initiation of her complaints:

> Beginning in 1989 following the EFMS conference, and continuing through plaintiff's resignation on August 15, 1990, plaintiff had numerous and on-going conflicts with Dr. Freisleben and Brian Olden. Appendix at A-6.
>
> Hostility and lack of mutual respect characterized plaintiff's relationship with both Dr. Freisleben and Brian Olden during at least the last ten months of plaintiff's tenure with the Bremerhaven EFMS Clinic, and doubtless contributed to the stress and unhappiness which in part motivated plaintiff's decision to submit her resignation. Appendix at A-15-16.

An example of the hostile environment to which plaintiff was subjected occurred on June 13, 1990. That morning, Olden confronted Montague in what she described as a very stern and severe manner when she arrived at the clinic office instead of going to one of the schools as Olden had expected. Montague testified that she began to feel ill, told Olden she needed to take the day off, and attempted to see a doctor. She returned and told Olden the doctor was not available until the afternoon and she was going home until she could see him. Olden testified that although Montague could not see the doctor until the afternoon, he told her that if she went home without medical documentation, she would be considered AWOL, a charge that could lead to termination. Olden's contemporaneous memo on the subject states: "I stated I needed to see your medical documentation before you went home, or you would be considered AWOL."

Montague saw the doctor later in the day on June 13, and provided Olden with a medical report that indicated:

- she reported a "history of recurrent emotional insults from her work place and unbearable anguish,"

- the doctor diagnosed her with "anxiety reaction" and found it was caused or aggravated by her employment, and

- the doctor released her to return to work the next day.

With that information in hand, Olden then sought a further medical evaluation regarding Montague's fitness for duty, and recommended she see a psychiatrist. Olden testified that Doug Dear, the personnel officer with whom Olden had been consulting regarding Montague, suggested the course of action he was following. Unlike his earlier memo, however, Olden's memos regarding Montague's fitness for duty and suggesting she see a psychiatrist did not indicate copies were sent to Dear. In addition, Dear directly contradicted Olden's testimony. Dear testified that Olden did not talk to him about Olden's request that Montague see a psychiatrist, and Dear "would never have discussed that sort of thing with any manager that I was advising." Dear also testified that it would have been improper, and contrary to Army regulations, for a manager to recommend that an employee see a psychiatrist. Olden tried to refer Montague for a psychiatric fitness-for-duty evaluation despite the fact that she had received approval from Lt. Colonel Leahy, deputy Commander of the MEDDAC, for a temporary transfer out of the EFMP clinic, and all she needed was Olden's agreement. Even after Olden had received Montague's request for that transfer, he continued to seek more medical information rather than respond to her request.

In February 1990, Colonel Judy Riggan, Colonel Onefur's colleague and the OTPT consultant for USAREUR (U.S. Army Europe) at MEDCOM, asked Montague why she did not just leave and go back to her private practice. Riggan also told another employee, around the same time, that she wished Montague would just leave.

A December 1990 report signed by Colonel Onefur and written by Colonel Riggan refers to a "chronic occupational therapy problem" that existed at Bremerhaven for 18 months, *i.e.* since June 1989, the time Montague first met with Paul Koffsky and other officials at the EFMP Conference.

The Army's Insistence that Montague Resign for Return of Her Household Goods

Montague testified that due to her concerns about her future employment and uncertainties about her housing situation, she inquired in May 1990 about the possibility of having the Army pay to have her household goods shipped back to the United States. Montague wanted the Army to approve her request to return her goods on a contingency basis should the need later arise. Montague testified she was told by two employees of the Civilian Personnel Office (CPO) that she could have her goods shipped home and she would not have to resign in order to do so. Montague later received a phone call from Doug Dear, who worked in another part of the CPO. Montague knew Dear as the person assigned to work with her supervisors in connection with their relationship with her. Dear testified that he did not typically get involved in matters involving travel and shipment of goods. Contrary to the information she initially had received, Dear told Montague that he would not process her request unless she resigned.

Montague testified that after she told Dear that she did not want to resign because she hoped her EEO charges would lead to a resolution of her difficulties, Dear warned Montague to be careful because he had seen people in her situation "rendered unemployable." Fearful of being rendered unemployable, Montague followed Dear's suggestion and provided him a letter indicating that due to ongoing discrimination, harassment and reprisal she "may be forced to resign." Dear later told Montague, that her letter was not sufficient, and that although the Commander had approved Montague's request, Dear's supervisor was now insisting on an actual resignation before Montague could have the release. Although she still had hope that her situation would be resolved through the EEO process, Montague testified that she remained concerned about being rendered unemployable and did submit her formal resignation, effective

August 15, 1990, with the idea that it could be withdrawn if she were given a new assignment. Since Montague had submitted her formal resignation, as requested, Dear then sent her the letter approving her release from her transportation agreement for three reasons, none of which required her resignation.

At trial, the Army contended that the travel regulations required a personnel action such as resignation before it would ship an employee's goods home. While the regulations may be interpreted as the Army indicated, the evidence is clear that the people who responded to Montague's request for transportation expenses in May and June 1990 were not basing their actions on that interpretation. The only regulation mentioned at the time, Section C4009, allows a commanding officer to release an employee from a period of service requirement in connection with a transportation agreement "for reasons beyond [the employee's] control which are acceptable to the Department of Defense component in which the employee is assigned." The regulation gives examples of acceptable reasons that do not necessarily involve termination of employment, including "illness" and "extreme personal hardship because of circumstances beyond [the employee's] control, such as conditions seriously affecting the health, welfare, and safety of employee." Finally, another employee testified that she, unlike Montague, had her request approved before she resigned and before she provided the Army with a date for her resignation.

The Army's Statements That Montague Should Leave Because Her Case Had Become Disruptive

In June of 1990 Olden wrote a memo indicating there were several factors that made Montague's "continued presence in the clinic untenable." Appendix at A-15. The first factor he mentioned related to "the time she spends pursuing her formal and informal complaints." *Id.*

The Army scheduled a meeting for July 18, 1990, for a discussion of the issues to be investigated in connection with

Montague's first two EEO complaints. The day before the meeting the Army's attorney, Max Lederer, called Montague's attorney, Donald Black, to inquire about the possibility of a settlement. Lederer wanted to know what it would take to get Montague to leave; to quit her job. The following day Lederer again asked what it would take to get Montague to leave. Black asked Lederer to explain what he meant—whether Montague could transfer to another facility in Northern Germany. Lederer told Black that Montague had to leave all of Northern Germany, and explained that the reason for that demand was that "management feels that her case has become disruptive to the installation."

Settlement of Montague's First Two EEO Complaints

On August 15, 1990, Montague and the Army entered into a settlement agreement resolving her first two EEO complaints. The Army's formal closing document shows that the Army made a finding of discrimination on those two complaints.

According to the other OT in at the EFMP in Bremerhaven, after the August 15th settlement Freisleben returned to the clinic office smiling and appearing happy, told the other employees about the settlement, and said that since Montague wanted her lawyers paid by the Army but had German legal insurance, "We can get her for fraud."

Montague's Resignation and Departure from Northern Germany

The trial court found that the hostility of Montague's supervisors "doubtless contributed to the stress and unhappiness which in part motivated plaintiff's decision to submit her resignation," and the court assumed "for the sake of analysis that the conditions and treatment plaintiff faced constituted a constructive discharge." Appendix at A-15-16, A-19.

Montague testified that when she initially submitted her resignation in June 1990 it was not a voluntary act — she felt she

had no choice. She had received the investigative report from the Army's EEO counselor who investigated her second EEO complaint, strongly reinforcing her beliefs that she was being retaliated against by her supervisors. In addition to his conclusions regarding their conduct toward Montague, the counselor found that Montague sincerely believed she must resign to save herself physically, emotionally and professionally and testified at trial that he believed Montague was sincere in her belief that management was forcing her to resign.

Montague testified that when she heard from her lawyer that the Army wanted to know what it would take to get rid of her and that her case was so disruptive the Army wanted her out of Northern Germany, she was devastated by that message and felt she no longer had any choice about rescinding her resignation and staying. The EEO counselor also testified that he believed she had been stunned by those statements.

When the effective date of her resignation arrived, Montague's only other option was to return to work for Freisleben and Olden. The EEO Counselor recalled Montague's response when he told her she could withdraw her resignation — that she believed she would be subject to more discrimination, harassment and reprisal. The Army's lawyer, Lederer agreed there was no other position available at that time, and he knew that Montague's relationship with her supervisors was very difficult.

The conduct and statements of Freisleben and Olden, most of which have been discussed above, indicate they wanted Montague to leave. Freisleben did not want the Army to settle Montague's EEO complaints, but wanted a hearing to clear the air.

Had Montague decided to return to the EFMP clinic on August 15, 1990, she would have risked the stress and permanent damage to her career from further discrimination, harassment, and reprisal. The EEO counselor had told Montague that before she was suspended her supervisors had sought permission to fire

her. Montague truly feared she would be fired. Montague was waiting for a resolution of her first two EEO charges, and hoping the resolution would result in an assignment to a position in which she would not be discriminated or retaliated against. When that resolution did not occur, she had no choice but to resign.

Basis for Federal Jurisdiction in the District Court

Montague's claims are based on the Rehabilitation Act of 1973, 29 U.S.C. §§791 *et seq.* The district court had jurisdiction under 28 U.S.C. §1331 and 42 U.S.C. §2000e-16(c) as incorporated by reference into 29 U.S.C. §794a.

REASONS FOR GRANTING THE PETITION FOR CERTIORARI

I. Whether the Rehabilitation Act provides a federal employee a cause of action for retaliation for complaints about the treatment of children with disabilities is an important question of federal law that should be settled by the Supreme Court.

The district court held that Montague's allegation of retaliation for "plaintiff's 'whistleblowing'-type activity, does not state a claim upon which any relief is afforded under the Rehabilitation Act." Appendix at A- 19. The Eighth Circuit affirmed, indicating, "the decision of the district court . . . contains no error of law." Appendix at A-2.

That holding should be reviewed by this Court because of the chilling effect it will have on the willingness of federal employees to complain when the government violates the rights of people with disabilities. It runs counter to the important principles and policies embodied in the Rehabilitation Act.

In its most recent statement of the purposes of the Act, Congress noted that millions of Americans have disabilities and that such individuals "constitute one of the most disadvantaged groups in society." 29 U.S.C. §701(a)(1) and (2). Congress detailed many of the invidious ways such individuals are mistreated: "individuals with disabilities continually encounter various forms of discrimination in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and public services." 29 U.S.C. §701(a)(5). Among Congress's purposes for the Rehabilitation Act are "to empower individuals with disabilities" through government programs and "the guarantee of equal opportunity." 29 U.S.C. §701(b)(1). In order to effectuate those lofty goals Congress recognized and declared it to be "the policy of the United States" that the

programs and activities supported by the Act provide "support for individual and systemic advocacy." 29 U.S.C. §701(c).

Review of the lower courts' holding in this case is critically important to the advancement of the rights and welfare of people with disabilities. As it stands, the holding precludes a judicial proceeding to protect a federal employee who advocates for the elimination of the evils found by Congress to "continually" impact the lives of millions of Americans.

Montague's complaints addressed concerns about the rights of the children with disabilities whom she was hired to serve in the DoDDS. She alleged they were being deprived of appropriate educational services, specifically occupational therapy and extended school year (summer school) services. The Rehabilitation Act and its implementing regulations require appropriate special education and related services for children with disabilities, including those attending the Department of Defense Dependent Schools overseas. *See Smith v. Robinson*, 468 U.S. 992, 1017 (1984) ("In regulations promulgated pursuant to §504, the Secretary of Education has interpreted §504 as requiring a recipient of federal funds that operates a public elementary or secondary education program to provide a free appropriate public education to each qualified handicapped person in the recipient's jurisdiction. 34 CFR §104.33(a) (1983)"); *Cox v. Brown*, 498 F. Supp. 823 (D.D.C. 1980) (preliminary injunction requiring private school placements for two children with disabilities due to the lack of appropriate services in DoDDS); *Yaris v. Special School District of St. Louis County*, 558 F.Supp. 545, 560-61 (E.D. Mo. 1983), *aff'd*, 728 F.2d 1055 (8th Cir. 1984) (discussing the rights of children with disabilities under the Rehabilitation Act and its regulations). The services about which Montague was complaining, occupational therapy and extended school year services can be required under the Rehabilitation Act when appropriate for the education of disabled children. *Howell v. Waterford Public Schools*, 731 F.Supp. 1314

(E.D. Mich. 1990) (OT); *Yaris v. Special School District of St. Louis County, supra* (extended school year).

The regulations adopted by the United States Equal Employment Opportunity Commission further express the policy of the federal government that retaliation is prohibited for advocating on behalf of individuals covered by the Rehabilitation Act. 29 C.F.R. 1614.101(b) broadly declares: "No person shall be subject to retaliation for opposing any practice made unlawful by . . . the Rehabilitation Act (29 U.S.C. 791 et seq.)." That regulation is applicable to the Army. 29 C.F.R. 1614.103(b)(1).

If the lower courts' ruling is correct, federal employees who are retaliated against because they advocate on behalf of individuals with disabilities will have no judicial forum in which to bring their claims. The Americans with Disabilities Act (ADA) has a clear anti-retaliation mandate. 42 U.S.C. §12203. As a result, employees of state and local government agencies and private agencies that serve individuals with disabilities have a clear avenue of redress for retaliation because of their complaints about the treatment of those individuals. *Cable v. Department of Developmental Services,* 1997 U.S. Dist. LEXIS 11049 (C.D. Calif. July 15, 1997) (Chief of Medical Staff has retaliation claim for objecting to unlawful practices under the ADA). The ADA, however, does not apply to the federal government. *See* 42 U.S.C. §§12111(5)(B)(i) (Title I - employment), 12131(1) (Title II - state and local government), and 12181(6) and (7) (Title III - private entities providing public accommodation). *See Crowder v. True*, 1993 U.S. Dist. LEXIS 17983, *16, 1993 WL 532455, 4 NDLR ¶325 (N.D. Ill. 1993), *aff'd on other grounds*, 74 F.3d 812 (7th Cir. 1996). So while state and local government employees and private employees may sue for retaliation in response to their third-party advocacy efforts, under the holding of the courts below, federal employees may not. That is an intolerable anomaly that should be reviewed by this Court.

The Whistleblowers Protection Act (WPA), which the district court apparently thought provides the exclusive remedy for such complaints, provides only for presentation of claims to the Merit Systems Protection Board and judicial review. 5 U.S.C. §1221. Moreover, contrary to the belief of the district court, the WPA itself indicates that it is not meant to be an exclusive remedy: "This section shall not be construed to extinguish or lessen . . . any right or remedy available to any employee in the civil service under . . . section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), prohibiting discrimination on the basis of handicapping condition." 5 U.S.C. §2302(d).

Lower court decisions dealing with the question whether the Rehabilitation Act provides a cause of action for retaliation for asserting the rights of others, have demonstrated the need for guidance from this Court. In *Hoyt v. St. Mary's Rehabilitation Center*, 711 F.2d 864, 867 (8th Cir. 1983), the Eighth Circuit indicated it believed that "retaliation against persons who make complaints under §504 is actionable." But now the Eighth Circuit has taken the opposite view, at least with respect to federal employees. The court in *Whitehead v. School Board for Hillsborough County*, 918 F.Supp. 1515, 1522 (M.D. Fla. 1996), held that parents have a retaliation claim under the Rehabilitation Act for asserting the rights of their disabled son. Yet in *Barry W. v. Illinois Valley Community Hospital*, 1995 U.S. Dist. LEXIS 15652, *11-*12 (N.D. Ill. September 26, 1995), the court reached the opposite conclusion, holding that the parents had no standing under the Act as they were not themselves disabled individuals.

This Court should grant the Petition, therefore, because of the importance of the question whether federal employees have a cause of action under the Rehabilitation Act when they are discriminated against because of their complaints about the violation of the rights of individuals with disabilities and because of the lower courts' need to have that question settled.

II. The question, in a statutory retaliation case, of which party bears the burden of persuasion on the issue whether an employee's activities in opposition to the unlawful practices of her employer are unprotected because the activities are disruptive and divisive, is an important question of federal law, over which the courts of appeal are divided.

In statutory retaliation cases, arising under the Rehabilitation Act, Title VII, the Americans with Disabilities Act, and the Age Discrimination in Employment Act, the appellate courts are divided on the important question whether the employer or the employee bears the burden of persuasion on the question whether the activities in opposition to the unlawful practices have gone too far to be entitled to protection.

The lower courts are in agreement generally as to the order and allocation of proof in a statutory retaliation case. As recently articulated by the Fourth Circuit:

> In order to establish a prima facie claim of retaliation in violation of Title VII, 42 U.S.C. §2000e-3(a), a plaintiff must show that "1) the employee engaged in protected activity; 2) the employer took adverse employment action against the employee; and 3) a causal connection existed between the protected activity and the adverse action." The employer may then rebut the prima facie case by showing that there was a legitimate non-discriminatory reason for the adverse action, after which the burden shifts back to the plaintiff to show that those reasons are pretextual.

Munday v. Waste Management of North America, Inc., ___ F.3d ___, 1997 U.S. App. LEXIS 23837, *8, 74 Fair Empl. Prac. Cas. (BNA) 1478 (4th Cir. September 11, 1997) (footnotes and citations omitted); *see also, e.g., Krouse v. American Sterilizer Co.*, ___ F.3d ___, 1997 U.S. App. LEXIS 26485, *10-*11 (3d Cir. September 26, 1997); *Raney v. Vinson Guard Serv.*,120

F.3d 1192; 1997 U.S. App. LEXIS 22844, *13-*14 (11th Cir. 1997).

When the employer defends on the ground that the employee's opposition went too far to warrant protection, however, the courts of appeals have taken a variety of vastly different approaches. Courts in some cases have held that "interpersonal friction" or "personality conflict" that is linked to protected speech is no defense at all; that it cannot serve as a legitimate basis for an employment action. *Collins v. Baptist Memorial Geriatric Center*, 937 F.2d 190, 193 n. 8 (5th Cir. 1991), *cert. denied*, 502 U.S. 1072 (1992); *Stever v. Independent School District*, 943 F.2d 845, 853 (8th Cir. 1991); *Patterson v. Masem*, 774 F.2d 251, 256 (8th Cir. 1985); *cf. Hickman v. Valley Local School Dist.*, 619 F.2d 606, 609 (6th Cir. 1980) (involving union activities). In other cases, however, courts have held that when the opposition takes the form of "unreasonably hostile or aggressive conduct" or "disloyalty" it can provide a legitimate, nondiscriminatory basis for an employer's action. *E.g., Jennings v. Tinley Park Community Consolidated School Dist.*, 796 F.2d 962 (7th Cir. 1986); *Wrighten v. Metropolitan Hosp., Inc.*, 726 F.2d 1346, 1354-55 (9th Cir. 1984); *EEOC v. Crown Zellerbach Corp.*, 720 F.2d 1008 (9th Cir. 1983); *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130 (5th Cir. 1981); *Hochstadt v. Worcester Foundation*, 545 F.2d 222 (1st Cir 1976).

The courts that adopt the view that opposition activity may lose its protection because of its interference with the employer's business generally hold that some kind of balancing must be undertaken. *Jennings, supra,* 796 F.2d at 968-69; *Wrighten, supra*, 726 F.2d at 1355-56; *Crown Zellerbach, supra*, 720 F.2d at 1014-16; *Payne, supra,* 654 F.2d at 1142; *Hochstadt, supra*, 545 F.2d at 229-32.

Those courts are not in agreement, however, on the issue of which party has the burden to show that the opposition went too far and, if the burden is on the employer, what sort of burden it

is. In *Hochstadt* the First Circuit referred to the issue as a "legal question," whether plaintiff's "hostile conduct . . . afforded an independent, nondiscriminatory basis for her discharge." 545 F.2d at 229. The court later hinted, however, that the burden is on the employer, when it commented: "the defendant employer satisfies the court . . . that the actual reasons were legitimate ones." 545 F.2d at 234 n. 8. The Fifth and Ninth Circuits clearly indicate that the employer has the burden of introducing evidence or articulating that the form or manner of plaintiff's opposition was the reason for the adverse action, as part of its rebuttal burden in response to the prima facie case. *Wrighten, supra*, 726 F.2d at 1354 ("introducing evidence"); *Crown Zellerbach, supra*, 720 F.2d at 1016 ("rebuttal burden of articulating"); *Payne, supra*, 654 F.2d at 1142-43 ("introduce evidence"). The Seventh Circuit agrees that the burden is on the employer, but unlike the Fifth and Ninth Circuits, the Seventh Circuit, in *Jennings*, "shifts the burden of persuasion" to the employer. *Jennings, supra*, 796 F.2d at 969 (dissenting opinion); *see also* 796 F.2d at 968 (majority opinion: "we remand . . . because the district court's comments do not make clear exactly what reason the court thought defendant had proven").

It is impossible to determine how the district court or the Eighth Circuit viewed the question of the burden of proof in this case, because neither court articulated any legal standards or cited any cases with respect to the order and allocation of proof. While the courts cited above all indicate a balancing is required when there is evidence of protected activities associated with divisiveness and disruption, there is no indication that the lower courts engaged in any such analysis in this case. As the First Circuit stated: "where an employee is discharged for aggressive and allegedly disruptive activities associated with her complaints of discrimination, it is plainly a delicate matter to separate out the protected from the nonprotected conduct." *Hochstadt, supra*, 545 F.2d at 229.

The district court made the finding that there was no retaliation despite and without mentioning the evidence and its own findings that Montague's supervisors' attitudes toward her and Montague's conflicts with them and others were linked to her protected activities. In addition, the court failed to consider the direct evidence of retaliation in the statement by the Army's attorney that "management" wanted Montague to leave her job because "her case has become so disruptive" and in the numerous statements by Montague's superiors that they were opposed to her engaging in protected activities. Thus, the court failed to follow the mandate of this Court, that, "At some point in the proceedings, or course, the District Court must decide whether a particular case involves mixed motives." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 247 n. 12 (1989).

In contrast to the statutory retaliation cases, in cases arising under the First Amendment this Court has made it clear that a balancing test is required and the government employer bears the burden of justifying its action by showing that its interest outweighs the employee's interest in speaking out. In *Pickering v. Board of Education*, 391 U.S. 563 (1968), the Court established the principle that the courts must "arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." 391 U.S. at 568. In subsequent decisions the Court has held that the employer bears the burden of proof on that issue. *Rankin v. McPherson*, 483 U.S. 378, 388 (1987); *Connick v. Myers*, 461 U.S. 138, 150 (1983).

The Court should grant the Petition to bring the same clarity and uniformity that it has established in First Amendment employment cases to statutory retaliation cases. The Court's last word on the subject of statutory retaliation cases came in 1972, when it said: "Nothing in Title VII compels an employer to absolve and rehire one who has engaged in such deliberate,

unlawful activity against it." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 803 (1972). The lower courts need guidance on how to handle cases in which an employee's oppositional activities are lawful, but the employer claims they are disruptive to its operations.

CONCLUSION

The courts below determined that federal employees have no cause of action when they are adversely treated by their employers in retaliation for complaining about the unlawful treatment of individuals with disabilities under the Rehabilitation Act. That ruling sets apart federal employees from their counterparts in state and local government and the private sector. The holding of the lower courts in this case also frustrates the important purposes and policy of the United States expressed by Congress in the Rehabilitation Act.

In addition, the district court concluded that Montague's federal employer treated her with such hostility that it would assume she was constructively discharged. Yet the court determined that Montague's supervisors treated her as they did not because of her complaints of illegal treatment of children with disabilities or because of her complaints of employment discrimination against herself, but, instead, because of her personality, divisive conduct, and conflicts with others. The court did not articulate any legal standards that guided its determination, did not indicate whether it considered the direct evidence to make this a mixed motive case, did not demonstrate any balancing of the interest of Montague in making her complaints versus the interest of her employer in avoiding divisiveness and disruption, and made no comment as to which party bore what burden on the issue whether Montague's activities warranted protection or went too far.

Both of the questions presented in this Petition involve important questions of federal law that have not been but should be settled by this Court. On the second question, regarding the burden of proof in statutory retaliation cases, the courts of appeals are seriously divided. For these reasons, Petitioner Lisa Montague asks this Court to grant her Petition for Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-3677

Lisa J. Montague,
Appellant,

v.

United States Department of the Army,
Secretary Togo D. West, Jr.;
Togo D. West, Jr.,
Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri

UNPUBLISHED

Submitted: May 23, 1997
Filed: July 31, 1997

Before BEAM, Circuit Judge, HENLEY, Senior Circuit Judge, and LOKEN, Circuit Judge.

PER CURIAM.

Lisa Montague was a civilian employee of the Army who worked as an occupational therapist providing services to the disabled children of United States military personnel stationed in Germany. She brought suit under the Rehabilitation Act of 1973, 29 U.S.C. §§701-797b, alleging that (1) she was constructively discharged from her job; (2) she was retaliated against by her supervisors for filing complaints with the EEOC and bringing to the attention of military commanders what she perceived were inadequacies and illegalities in the treatment of disabled children; and (3) she was discriminated against because her super-

visors thought that her sympathy for handicapped children was evidence that she suffered from a mental or emotional disease.

The case was tried to the district court sitting without a jury. The court entered judgment against Montague and for the defendants on each count of her second amended complaint, explaining its decision in a thorough and well-reasoned opinion.

Montague now appeals contending that the court erred as a matter of law with respect to its conclusions on each of the counts of her complaint. After a review of the record, the briefs of the parties, and the opinion of the district court, we find that the decision of the district court in favor of the defendants contains no error of law, that the findings of fact by the district court are not clearly erroneous, and that an extended opinion by our court would have no precedential value.

Accordingly, the judgment appealed from is affirmed. *See* 8th Cir. R. 47B.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:94CV837-DJS

LISA J. MONTAGUE,
Plaintiff,

vs.

TOGO D. WEST, JR.,
Defendant.

MEMORANDUM OPINION

[Filed: August 9, 1996]

Plaintiff brings the instant three-count second amended complaint against the Secretary of the Army. The action arises out of the termination of plaintiff's civilian employment as an occupational therapist at the United States Army Medical and Dental Activity ("MEDDAC") facility in Bremerhaven, Germany. All three counts are based on plaintiff's allegation that the Army compelled her involuntary resignation and thereby constructively discharged her; each count asserts a different unlawful basis for the Army's conduct. Count 1 asserts that the adverse treatment plaintiff received was in reprisal for her filing of Equal Employment Opportunity ("EEO") charges of unlawful discrimination, in violation of the Rehabilitation Act of 1973, 29 U.S.C. §791 *et seq.* Count 2 asserts a claim under the Rehabilitation Act and the Whistleblowers Protection Act of 1989 ("the WPA"), 5 U.S.C. §1221, alleging that the adverse treatment was in reprisal for plaintiff's disclosures concerning the Army's treatment of children with disabilities at the Bremerhaven MEDDAC. Count 3, another Rehabilitation Act claim, asserts

that the adverse treatment was based on a perception that plaintiff suffered from a mental disability.

The case was tried to the Court sitting without a jury. This Court having considered the pleadings, the testimony of the witnesses, the documents in evidence, and the stipulations of the parties, and being fully advised in the premises, hereby makes the following findings of relevant fact and conclusions of law, in accordance with Fed.R.Civ.P. 52(a).

Findings of Fact

1. On July 9, 1988, plaintiff was appointed to a position as an Occupational Therapist at the MEDDAC facility in Bremerhaven, Germany, assigned to the Exceptional Family Member Program ("EFMP"). Plaintiff's duties with the Exceptional Family Member Services ("EFMS") Clinic included providing occupational therapy services to disabled dependents of military and civilian personnel of the Department of Defense ("DOD") stationed in Northern Germany.

2. In approximately September, 1988, Dr. Lois Freisleben, a developmental pediatrician, became chief of the Bremerhaven EFMS Clinic.

3. Dr. Freisleben completed an "Evaluation of Privileges/ Performance Assessment" concerning plaintiff's performance for the period from October, 1988 through July, 1989, in which Dr. Freisleben assigned plaintiff the highest rating in all applicable categories.

4. A "Civilian Performance Rating" form signed by Dr. Freisleben on July 19, 1989 indicates that plaintiff's performance met or exceeded Dr. Freisleben's expectations in each applicable category of assessment, and includes favorable explanatory remarks.

5. In 1989, plaintiff began to complain to Dr. Freisleben about the space provided for her therapy sessions at the two local

elementary schools which she served in Bremerhaven and Olsterholz. Plaintiff considered the space to be inadequate for a number of reasons, including small size, poor lighting, and inaccessibility. Plaintiff also eventually made similar complaints to a Colonel Bell, then an Occupational Therapy/Physical Therapy Consultant, and Colonel Charles Onefur, Medical Director for the EFMP in Europe.

6. At the annual conference of the European EFMP, held in June, 1989 in Willingen, Germany, plaintiff discussed her concerns about the Bremerhaven EFMP with Paul Koffsky, an attorney with the office of the General Counsel of the Department of Defense at the Pentagon. Koffsky introduced plaintiff to a group of other participants and speakers at the conference, with whom plaintiff continued to discuss her concerns and criticisms. Plaintiff testified that this group included Carl Grube, Director of Special Education for DoDDS, and other persons whose positions plaintiff considered to be influential in the field of special education.

7. Plaintiff testified that the group encouraged her to write a report cataloguing her concerns and requesting an official monitoring team to assess the EFMS in Northern Germany, and that the group further indicated that if she routed such a report "through channels" they would help when it reached their level.

8. The next morning, plaintiff talked with Dr. Freisleben about her discussions with Koffsky and others the previous evening; Dr. Freisleben did not support the circulation of the memorandum and the request for a monitoring team which plaintiff proposed.

9. Plaintiff also enumerated to Dr. Freisleben certain conditions which plaintiff wanted met in order for plaintiff to remain with the Bremerhaven EFMS Clinic. These included a promotion to a higher job and salary classification level (from GS-9 to GS-11), conversion of the clinic's physical therapist position to

a second occupational therapist position, the use of German nationals to provide specific types of occupational therapy under plaintiff's supervision, and the writing and routing of the document Koffsky and the group had suggested.

10. In the fall of 1989, plaintiff had conflicts with personnel of the Department of Defense Dependents Schools ("DoDDS") concerning plaintiff's dissatisfaction with the space provided by the schools for her therapy sessions, and for a period of time plaintiff refused to provide services at the Osterholz school because she deemed the facilities inadequate. The schools were required to report that authorized services were not being provided, and plaintiff considered those reports to be personal attacks on her.

11. In the fall of 1989, Dr. Freisleben began to conclude that plaintiff's personality and demands precipitated a number of conflicts with school personnel, and Dr. Freisleben became concerned that her own credibility would be affected if she continued to support plaintiff in all of her many disputes.

12. During a "staff assistant visit" to the Bremerhaven EFMP by Colonel Onefur, plaintiff complained to him about the insufficiency of space for occupational therapy in the DoDDS schools, and showed him pictures of the space in which she was then providing therapy. Colonel Onefur told plaintiff that therapy facilities were a known problem which others in the European EFMP were experiencing also, and which he had himself attempted to address, with little success.

13. Brian Olden is a social worker who was assigned to the Bremerhaven EFMS Clinic in June, 1989, approximately one year after plaintiff's arrival.

14. Beginning in 1989 following the EFMS conference, and continuing through plaintiff's resignation on August 15, 1990, plaintiff had numerous and on-going conflicts with Dr. Freisleben and Brian Olden.

15. In late 1989 and 1990, plaintiff was experiencing difficulties in a romantic relationship in which she was involved with a man who lived in Bremerhaven. Plaintiff hoped the relationship would become permanent, but the relationship was eventually terminated by the other party. On one occasion in the fall of 1989, at plaintiff's request, Dr. Freisleben prescribed Xanax for plaintiff, who complained of stress resulting from problems with this relationship.

16. An additional source of stress for plaintiff during this period was her housing situation. In September, 1989, plaintiff's landlord sent her a letter requesting that she leave her rented house in Bederkesa, Germany, and he continued through 1990 to exert pressure on plaintiff to do so.

17. During this time, plaintiff experienced mental and physical problems associated with anxiety, for which she was receiving medical treatment.

18. Plaintiff's relationship with Brian Olden became adversarial shortly after Dr. Freisleben reassigned some of plaintiff's administrative duties to Olden and made Olden plaintiff's supervisor in late October, 1989.

19. These changes in the assignment of plaintiff's and Olden's duties occurred partly in response to plaintiff's complaints that she was under considerable stress from personal problems and overload at work, and needed more help in scheduling and other administrative tasks. Dr. Freisleben was aware of Olden's supervisory and managerial experience and asked Olden to take over administrative supervision of the clinic staff, which was primarily a scheduling function.

20. Shortly after Dr. Freisleben notified the staff of Olden's new role, Olden sent a memorandum to plaintiff setting out the work schedule which he was assigning to her, specifically prescribing the days of the week and times she was to provide

therapy at the two elementary schools she served, as well as setting limitations on overtime work and on her provision of services to preschool children.

21. Plaintiff resented being supervised by a social worker, because she considered it inappropriate for an occupational therapist to be supervised by non-medical personnel. Plaintiff particularly resented Olden's somewhat dictatorial management style, which was in part Olden's response to his perception of plaintiff as a stubborn, rigid person, resistant to his authority over her. Hostility between plaintiff and Olden continued to escalate through 1990, and communication and cooperation between them was extremely poor.

22. Following the 1989 EFMS conference, plaintiff solicited the help of a Kim Mickelson, a paralegal with the Judge Advocate General's office in Bremerhaven, in preparing the document for circulation to Paul Koffsky and others concerning plaintiff's complaints about the provision of therapy services. Mickelson did legal research and drafted the document with plaintiff's input.

23. Dr. Freisleben met with plaintiff and Mickelson in plaintiff's office to discuss the memorandum several times, during which meetings she at times expressed her opposition to the memorandum. Dr. Freisleben reviewed a draft and suggested edits which Mickelson incorporated into the memorandum. Plaintiff alleges that the document had to be re-created after the draft was inexplicably deleted from Mickelson's computer or computer disk.

24. When plaintiff and Mickelson finalized the memorandum in late October, 1989, Dr. Freisleben would not sign and route it through official channels. Plaintiff signed the memorandum, which was addressed to Dr. Richard Rhodes, Superintendent, DoDDS Europe, and Dr. Jane Ware, Assistant Superinten-

dent. In December 1989, plaintiff sent the memorandum to Paul Koffsky only, who circulated it to others.

25. The final memorandum reviewed plaintiff's complaints concerning the provision of acceptable facilities, and requested transportation by DoDDS for plaintiff's use in providing occupational therapy services to children. Despite some attempts to couch her criticisms in neutral terms, plaintiff's complaints make numerous references to herself as the aggrieved "OT," including the following paragraph:

> 8. The OT has been the subject of numerous slanderous letters and memoranda written by DoDDS personnel and published to other DoDDS, EFMS and MEDDAC Command officials. The attacks and allegations made in these letters have been, without exception, unfounded and malicious. Their only purpose seems to be an attempt, on the author's part, to malign, harass, and destroy the professional reputation of the OT. These attacks should be halted immediately and a formal apology should be issurd (sic) by Dr. Rhodes to the recipients of these memos. This places these officials on formal notice of the OT's grievance based on infractions of civil tort law. This correspondence history exacerbates an already difficult situation. DoDDS appears to be attempting to shift the blame to the OT and EFMS for non-compliance, rather than looking for solutions. The letters, naturally, engendered shock on the part of EFMS and extreme and undue stress to the only OT, and damaged the working relationship between EFMS and DoDDs.

26. Dr. Freislaben's unwillingness to endorse and sign the memorandum was justified by the self-righteous and judgmental tone of the memorandum, as well as her belief that the circulation of the memorandum represented poor political judgment and was not likely to be efficacious.

27. Olden was aware of plaintiff's dissatisfaction with the space provided for her therapy sessions at the Olsterholz and

Bremerhaven schools, but was at first cautious about approaching the responsible DoDDS personnel to seek an alternative arrangement because he was so new to the post. Olden was also aware that space for the provision of occupational therapy was a chronic problem in Germany's EFMP.

28. In the fall of 1989, changes were made to address the space problem. Olden's discussions with the principal of the Olsterholz school resulted in the use of a kindergarten classroom for plaintiff's therapy sessions. Transportation was arranged so that the children from the Bremerhaven school were brought to the EFMS Clinic for therapy with plaintiff.

29. Plaintiff admits that as of the date she signed the memorandum she later sent to Paul Koffsky, some of the complained-of problems concerning facilities for therapy were being corrected.

30. In January, 1990, plaintiff had contacts with Kay Hack of the DOD Inspector General's Office, by telephone and letter, in which plaintiff catalogued both her personal and professional differences with Dr. Freisleben and Brian Olden.

31. On February 26, 1990, plaintiff sent a follow-up letter to Paul Koffsky outlining additional criticisms of the occupational therapy services being provided by Bremerhaven MEDDAC. The letter specifically included criticisms of the extent of Dr. Freisleben's and Brian Olden's authority.

32. Also on February 26, 1990, plaintiff sent to then-Senator Robert Dole a copy of her correspondence to Koffsky, along with pre-complaint materials she had submitted to the Equal Employment Opportunity Office concerning an EEO charge not at issue in this case. From Colonel Richard Marcure, Commander of Bremerhaven MEDDAC, Dr. Freisleben received copies of the materials plaintiff sent to Senator Dole, after Senator Dole's office faxed them to Colonel Marcure.

33. In response to plaintiff's October, 1989 memorandum, an investigative team from DoDDS made a site visit to Bremerhaven MEDDAC on May 31 and June 1, 1990, led by Carl Grube, DoDDS' Director of Special Education. A report was prepared by the team stating their findings with respect to plaintiff's allegations.

34. The team found that any problems with inadequate space for occupational therapy had been corrected, in that the Bremerhaven children were transported to the EFMS clinic for therapy and the Osterholz children were receiving therapy in an appropriate and adequate classroom space. The team found that plaintiff's allegations that she had been slandered were without merit. The report concludes that many of plaintiff's claims of violations "appear to have been based on a misunderstanding of DoD, DoDDS, and EFM regulations and guidance." The team also found that the Bremerhaven EFMP was "using an appropriately experienced and trained individual in the role of administrative supervisor," and that administrative actions complained of by plaintiff "were within the scope of management options and were taken after consultation with the management and employee relations specialist." The investigative team found all of plaintiff's allegations to be "unsubstantiated" by their investigation. The report was approved by the Office of the Assistant Secretary of Defense for Family Support, Education and Safety.

35. During Grube's visit, Grube commented to Dr. Freisleben that Bremerhaven had a history of problems, and Dr. Freisleben replied that that was only because of one employee.

36. A second occupational therapist, Maria Laudenslager, arrived at Bremerhaven's EFMS Clinic in December, 1989.

37. Ms. Laudenslager shared an office with plaintiff for a time, but Ms. Laudenslager asked to be moved because plaintiff was "discussing issues all the time."

38. In approximately February of 1990, Ms. Laudenslager talked with Dr. Freisleben about wanting to leave Bremerhaven because she feared the verbal abuse she observed Brian Olden direct toward plaintiff. Dr. Freisleben told Ms. Laudenslager that Olden would not treat her that way, and Olden never did.

39. In approximately January, 1990, plaintiff overheard Brian Olden remark to Colonel Riggan, in reference to Ms. Laudenslager's trip to Nuremburg, that he hoped they have some "sane OTs" there.

40. Both Dr. Freisleben and Brian Olden perceived plaintiff to be unreasonably preoccupied with what she deemed unfair or unacceptable concerning both their supervision of her and the conditions under which her clinical services were to be performed; they believed that plaintiff's preoccupation with these matters consumed much of her time and energy that it interfered substantially with the performance of her clinical duties.

41. Both Dr. Freisleben and Brian Olden considered plaintiff's complaints of work-related stress to be exaggerated and unreliable, and plaintiff's stress to be largely due to her personal problems with her housing and boyfriend, and to the inevitable friction with others resulting from her rigid, difficult and demanding personality. Neither Dr. Freisleben nor Olden believed plaintiff's job responsibilities were unduly stressful.

42. Neither Dr. Freisleben nor Olden ever sought to discharge plaintiff or pursued that option through the chain of command or with the personnel office.

43. In May, 1990, Olden denied plaintiff's request for ten days of home leave, because plaintiff had in the several months preceding the request taken two weeks of emergency leave and more than two weeks of sick leave.

44. During plaintiff's tenure, Ruth Scott, formerly Ruth Wiley, became the EFMP Coordinator and a confidante of

plaintiff. Ruth Wiley testified that Dr. Freisleben once told her that plaintiff was not an emotionally stable person and, in effect, that things would be better after they "got rid of" plaintiff.

45. Plaintiff sent a memorandum to Brian Olden dated May 12, 1990, addressing what she considered to be an invasion of her privacy, namely that on her appointment schedule, kept in the public portion of the clinic office, the word "Suspension" was written on the week of April 9 through 13. That suspension was later expunged pursuant to the August 15, 1990 settlement of her April 12 and May 24 EEO complaints, neither of which is at issue in this action.

46. A German psychotherapist, Dr. Gabriele Bode, signed a "Medical Certificate" dated May 23, 1990, reading as follows:

> After several psychotherapeutic sessions I can certify that Miss Lisa J. Montague suffers from severe anxiety problems with depressive symptoms triggered off by emotional stress at her job in the army. To prevent more severe emotional damage it seems necessary for Miss Montague to leave her present job.

47. Plaintiff brought this statement of Dr. Bode's to Dr. Freisleben in late May or early June, 1990. Dr. Freisleben believed plaintiff was under stress with which she was not coping effectively, but did not believe plaintiff to be mentally ill. Dr. Freisleben was skeptical that plaintiff's job was the primary source of her stress.

48. On the morning of June 13, 1990, a confrontation occurred between Brian Olden and plaintiff in the clinic offices, concerning his belief that plaintiff was due in Osterholz that morning and should not have been in the clinic. Plaintiff believed that the Olsterholz therapy was being covered by Ms. Laudenslager that day. Olden considered his questioning of plaintiff to be necessary enforcement of the therapy schedule which he had set.

49. During the confrontation, plaintiff stated that she was not feeling well and would take the day off as a sick day and see Dr. Marc David, a family medicine physician assigned to Bremerhaven MEDDAC. Olden warned plaintiff that an unsubstantiated sick day might be considered "AWOL," an absence without leave. Plaintiff later had worker's compensation injury claim forms prepared alleging that Brian Olden had that day inflicted an emotional injury on her.

50. Dr. David's report of plaintiff's June 13, 1990 visit states that plaintiff reported a history of "recurrent emotional insults from her work place and unbearable anguish," and noted that plaintiff had had an "anxiety reaction." Dr. David recommended that plaintiff follow up with the German psychiatrist she was already seeing. The report indicates that when Dr. David advised plaintiff that she was able to resume work, plaintiff replied that she felt unable to keep working in that environment.

51. In an exchange of memoranda between plaintiff and Brian Olden following the June 13 incident, Olden suggested that plaintiff see the Army's Bremerhaven psychiatrist, Dr. Alvarado, who might be able to confirm plaintiff's complaints of work-related stress. Neither Olden nor Dr. Freisleben ever ordered plaintiff to see Dr. Alvarado.

52. Also on June 13, plaintiff went to see Lieutenant Colonel Dennis Leahy, who, approximately one week earlier, had taken the position of Deputy Commander of Bremerhaven MEDDAC. Plaintiff asked Colonel Leahy to address the harassment she claims she was being subjected to at the clinic. Colonel Leahy suggested that plaintiff be reassigned to another duty for a "30-day cooling-off period." Such a reassignment was ultimately approved and arranged.

53. When Dr. Freisleben sought Brian Olden's view of the proposed reassignment of plaintiff, Olden indicated his support

for the proposal in a memorandum to Dr. Freisleben dated June 21, 1990, the text of which reads in pertinent part as follows:

> 1. There are a number of factors which make Ms. Montague's continued presence in the clinic untenable.
>
> a. Due to the time she spends pursuing her formal and informal complaints, Ms. Montague's productivity in her clinical duties is at a virtual standstill. She has indicated that she is not interested in arranging appointments for therapy for children who could be seen in the summer.
>
> b. Her supervision requires a great deal of my time and energy, which has affected my own productivity. She does not keep me informed of her whereabouts, and it is time consuming for me to determine her activities.
>
> c. She has made claims of a stress-related illness, but sick claims have been non-specific and she has refused to have this confirmed by a U.S. government medical officer. Although she has not supported this claim, she is using it to justify her inability to perform her duties. Nonetheless, if she is experiencing stress, I see no reason to continue her duties in the clinic since she will be resigning on August 15.
>
> 2. Given these factors, I recommend that Ms. Montague be "detailed" to the hospital, to work her last 6 weeks there and to terminate her relationship with the clinic.

54. On approximately June 21, plaintiff was reassigned to the MEDDAC hospital, and did not return to the EFMS Clinic. Plaintiff left Bremerhaven on August 17 on a bus for Hamburg. Plaintiff departed from Hamburg the following morning for the United States.

55. Hostility and lack of mutual respect characterized plaintiff's relationship with both Dr. Freisleben and Brian Olden during at least the last ten months of plaintiff's tenure with the

Bremerhaven EFMS Clinic, and doubtless contributed to the stress and unhappiness which in part motivated plaintiff's decision to submit her resignation.

56. Dr. Freisleben's and Brian Olden's hostility toward plaintiff was not engendered by retaliation for her EEO complaints or any "whistleblowing" activity, nor by any perception that she suffered from a mental disability. Instead, Dr. Freisleben's and Brian Olden's treatment of plaintiff was motivated by their impatience with and dislike of her increasingly difficult and demanding personality, her numerous conflicts with others, her inability to deal effectively with what they perceived as the ordinary demands of her professional and personal life, and the impact of these factors on her decreasing job performance.

57. In connection with her appointment to the Bremerhaven position, plaintiff executed a transportation agreement which provided that, until she completed the prescribed tour of duty of 36 months, she would not be eligible for return travel and transportation allowances at government expense, unless the reason for the early return was beyond plaintiff's control and acceptable to "the employing activity."

58. On May 10, 1990, plaintiff submitted to Jens-Uwe Beilharz, Chief of Technical Services of the Civilian Personnel Office, a request for "release from" the transportation agreement, by which she sought the shipment of her household goods back to the United States at government expense, prior to the completion of her tour of duty.

59. The applicable regulations do not provide for such a "release from" a transportation agreement, but that term is commonly used to signify two benefits to the requesting employee: (1) early release from the period of service commitment without any attempt by the government to seek reimbursement of the expenses previously paid for the employee's transportation to the post, and (2) separation travel at government expense.

60. On approximately May 16, 1990, Doug Dear, manager of the Bremerhaven facility's management/employee relations office, informed plaintiff that her request for release from the transportation agreement would not be approved unless she tendered her resignation.

61. On May 16, 1990, plaintiff signed a memorandum addressed to Doug Dear captioned "Notice of intent to tender resignation," in which she wrote: "Due to ongoing discrimination, harassment and reprisal I may be forced to resign my position as Occupational Therapist for the Bremerhaven MEDDAC on or about the first of August 1990."

62. Plaintiff received a letter dated June 7, 1990 from Jens-Uwe Beilharz stating that her request for a release from her transportation agreement had been granted, conditioned upon plaintiff's resignation no later than August 15, 1990.

63. On June 8, 1990, plaintiff executed a "Request for Personnel Action" memorializing her resignation effective August 15, 1990.

64. In the absence of a resignation, the return shipment of plaintiff's household goods at government expense was not authorized under the applicable travel and transportation regulations.

65. Plaintiff's civilian position was at-will employment, but in the event of early separation, prior to completion of the 36-month tour specified in her transportation agreement, plaintiff was not entitled to separation transportation.

66. Any condition that plaintiff submit a resignation in order to have her household goods shipped back to the United States at government expense was in accordance with applicable regulations and common practice. The requirement was not motivated by reprisal for plaintiff's filing of EEO charges, was not motivated by reprisal for any actions by plaintiff which were

protected under the Whistleblowers Protection Act, 5 U.S.C. §1221, and was not discrimination based on a perception that plaintiff suffered from a mental disability.

Conclusions of Law

Given the federal statutory origin of each of plaintiff's three causes of action, the Court has jurisdiction over this matter pursuant to 28 U.S.C. §1331. Both parties agree that, pursuant to 42 U.S.C. §2000e-5(f)(3), venue is proper in this district because records of plaintiff's employment with the Army are maintained and administered at the National Personnel Records Center in St. Louis, Missouri.

Count 1 asserts that plaintiff was compelled to involuntarily resign in reprisal for her filing of EEO charges of unlawful discrimination in violation of the Rehabilitation Act of 1973, 29 U.S.C. §791 *et seq.* Assuming without deciding that the type of retaliation alleged is actionable under the Act, the Court nonetheless concludes that plaintiff has failed to prove that such retaliation occurred. Plaintiff bears the ultimate burden of persuading the finder of fact that there exists a causal connection between her protected activity — namely the filing of EEO complaints of discrimination — and the alleged constructive discharge. As the Court's findings of fact indicate, the Court is not persuaded that a retaliatory motive played a role in the adverse treatment of which plaintiff complains.

Instead, the Court finds that the treatment plaintiff received from Dr. Freisleben and Brian Olden was motivated by their dislike of plaintiff's increasingly difficult personality and their impatience with plaintiff's own divisive conduct, which ultimately eroded not only their personal regard for plaintiff but also their confidence in her ability and willingness to perform the duties of her employment. There exists no doubt that plaintiff's relationship with her supervisors became acrimonious, and the conduct of all three parties was ultimately characterized by

hostility. Even if the Court supposes for the sake of analysis that the conditions and treatment plaintiff faced constituted a constructive discharge, such conduct, though not to be praised, does not entitle plaintiff to relief when its motivation is not barred by law.

Similarly, the Army's insistence on plaintiff's resignation as a condition of "release from" her transportation agreement was not motivated by reprisal for plaintiff's EE0 complaints. As indicated in the Court's findings above, such a condition was consistent with the terms of plaintiff's transportation agreement, applicable regulations and common practice. *See* Pltf. Exh. 11 and Def. Exh. AR. The Court's conclusion is the same whether its review of the Army's interpretation of the agreement and regulations is governed by a deferential or de novo standard. The "blank check" plaintiff sought, for transportation of her goods back to the United States at any time over an indefinite period, regardless of her separation from employment, was not available under the provisions of her agreement or the applicable regulations. Plaintiff has entirely failed to persuade the Court that unlawful retaliatory motive prompted the insistence on plaintiff's resignation as a condition of transportation of her goods at the government's expense. The Court will therefore enter judgment in defendant's favor on the reprisal claim asserted in Count 1 of the second amended complaint.

Count 2 asserts a claim under the Rehabilitation Act and the Whistleblowers Protection Act of 1989 ("the WPA"), 5 U.S.C. §1221, alleging that plaintiff was constructively discharged in retaliation for her disclosures concerning the Army's treatment of children with disabilities at the Bremerhaven MEDDAC facility. The Court concludes that the factual basis alleged for this claim, *i.e.* plaintiff's "whistleblowing"-type activity, does not state a claim upon which any relief is afforded under the Rehabilitation Act. More appropriately pled under the WPA, plaintiff nonetheless fails to state a claim upon which relief may

be granted. The WPA, specifically 5 U.S.C. §1221(h)(1), authorizes judicial review only of the final decision of the Merit System Protection Board concerning the claim of an aggrieved federal employee. Plaintiff's post-trial briefs appear to concede the point by failing to respond to defendant's argument that plaintiff has neither pled nor proved that she has exhausted this claim with the Merit System Protection Board prior to seeking judicial review.

In the alternative, defendant would be entitled to judgment on either of two additional bases. First, plaintiff has, in the Court's view, failed to prove that her alleged "whistleblowing" activity was based on a reasonable belief in the existence of a violation of law, rule or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, *see* 5 U.S.C. §1213(a) & §2302(b)(8). In view of the personal nature of many of plaintiff's "whistleblowing" complaints, as well as the official inquiries which ultimately found plaintiff's complaints of violations to be unsubstantiated or without merit, plaintiff has failed to prove that her complaints constitute activity protected under the WPA.

Second, plaintiff has not persuaded the finder of fact that the conduct of which she complains was unlawfully motivated by retaliation for plaintiff's disclosures of information, even if the Court assumes that the disclosures were protected under §1213(a) & §2302(b)(8). For the same reasons as previously stated, the Court does not find that this second of the three unlawful motivations alleged by plaintiff actually prompted the adverse treatment she received. For all of these reasons, the Court will enter judgment in favor of defendant on Count 2 of plaintiff's second amended complaint.

Count 3, another Rehabilitation Act claim, asserts that plaintiff was constructively discharged based on a perception that she suffered from a mental disability. This claim, too, is defeated by

the Court's determination as a matter of fact concerning the motivation for the treatment of which plaintiff complains. The Court did not find credible all of the testimony offered by plaintiff as to statements by Dr. Freisleben and Brian Olden which might have lent support to a finding that they perceived her to have a mental disability. The credible evidence supports, at best, findings of one or two stray remarks of a casual and largely sarcastic nature expressing frustration with and an inability to understand plaintiff's difficult behavior.

Dr. Freisleben and Brian Olden were certainly made aware, by plaintiff herself, of her claims of stress and anxiety, and appear also to have been aware that plaintiff at times sought medical attention for those problems. The Court is nonetheless unpersuaded that Dr. Freisleben and Brian Olden regarded plaintiff as having a mental impairment which substantially limited any of her major life activities. To the contrary, Dr. Freisleben and Brian Olden believed plaintiff exaggerated her alleged symptoms of anxiety and stress, and considered her performance and working relationships to be impaired not by an actual mental condition but by the shortcomings of plaintiff's personality. As for the person or persons who imposed the requirement of her resignation as a condition of plaintiff's "release from" the transportation agreement, plaintiff has also failed to prove that they regarded her as having a mental disability.

The basis for judgment in defendant's favor on Count 3 of the second amended complaint is therefore two-fold. The Court finds that plaintiff has not proved that she was perceived by any of the relevant persons to have a mental disability as defined in the Act. Second, as has been previously stated with respect to Counts 1 and 2 as well, the Court finds that the treatment of which plaintiff complains was not motivated by a species of discrimination prohibited under the Act.

For all the foregoing reasons, the Court this day separately enters judgment in favor of defendant and against plaintiff on all counts of plaintiff's second amended complaint.

/s/ Donald J. Stohr
UNITED STATES
DISTRICT JUDGE

Dated: 8/9/96

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:94CV837-DJS

LISA J. MONTAGUE,
Plaintiff,

vs.

TOGO D. WEST, JR.,
Defendant.

JUDGMENT

[Filed: August 9, 1996]

Pursuant to the memorandum opinion entered separately herein this day,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that judgment is entered in favor of defendant and against plaintiff on all counts of plaintiff's second amended complaint.

/s/ Donald J. Stohr
UNITED STATES
DISTRICT JUDGE

Dated: 8/9/96